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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 481

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

SUN OIL COMPANY, *Respondent*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
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ALPHA LAW BRIEF CO., HOUSTON

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Under the applicable Spanish Law, as well as at Common Law, the TIDE limits the shore.

Recognizing that its sole claim must fail unless the land in suit is "seashore" under Spanish law, respondent argues that *tide* is not the criterion for determining the boundary of the shore under Spanish law. Respondent says:

> "* * * the Spaniards were not concerned with astronomical tides. They were concerned, precisely as the Romans were concerned, with nothing but sea water; the extent to which the waves of the sea rolled in normal times." (Brief for Respondent, p. 24.)

Upon this contention hangs respondent's entire case; this is the basis upon which respondent seeks to uphold the decision of the lower court. Yet this very contention was expressly rejected by the Court of Appeals, which held that *tide*, and nothing else, limits the seashore under Spanish law as well as at Common law. Respondent's contention is wholly incompatible with the holding of the Court of Appeals on the controlling question, as demonstrated by the following quotation from the opinion:

> "Under the civil law, from the Institutes of Justinian until the present time, the seashore has been common property, and the alluvion that was added thereto belonged to the owners whose lands were bounded by the sea. This precept of the Roman law remains today as the guiding principle in both civil and common-law jurisdictions unless changed by code or statute * * * The low *tide** line is the seaward boundary of the shore in both civil and common law countries * * * By the civil law, the shore extends to the line of the highest *tide* in winter. *Galveston v. Menard*, 23 Tex. 349; *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559; *DeMerit v. Robison*, 102 Tex. 358; *Heard v. Town of Refugio*, 129 Tex. 349 * * *
>
> "There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind * * * The tide is another matter; there is nothing erratic about it. The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons or other circumstances * * * *The tide delimits the shore, and it is no respecter of the conflict of laws* * * * Shore is sometimes said to be synonymous with 'flats'; 19 Cyc. 1078; 29 Cyc. 355; but *flats are not*

* Emphasis supplied throughout unless otherwise indicated.

> *shore unless the tide ebbs and flows over them* * * * *"* (R. 1935-1936; 190 F. 2d 194-195.)

Under this holding the flats in controversy could not be "seashore" because the tide does not ebb and flow over them. The fact that the tide does not ebb and flow over this land is undisputed. The Court of Appeals said:

> "*It was admitted by plaintiffs* below that the land in controversy, at the time of suit, was above sea level and above mean high tide, and *that the waters of Laguna Madre encroached upon this land only when blown there by the wind.*" (R. 1933; 190 F. 2d 194.)

The holding that *tide* determines the boundary between seashore and upland under Spanish law undoubtedly is correct. Any other holding would conflict with the definition of "seashore" contained in Las Siete Partidas. In Texas the accepted translation of the Partidas is by S. P. Scott, published for the Comparative Law Bureau of the American Bar Association. That translation, which is cited by respondent, contains the following definition of "seashore":

> "* * * All that land is designated the shore of the sea which is covered with the water of the latter *at high tide* during the whole year, whether in winter or in summer."

Respondent avoids the words "at high tide" by simply deleting them whenever quoting from Las Siete Partidas. Such deletion occurs on pages 2, 3, 4, 33 and 45 of respondent's brief; in no instance does respondent quote the definition as it appears in Scott's translation. In STATE v. BALLI, 144 Tex. 195, 250, the Texas Supreme Court expressly adopted the Scott translation (exactly as it appears in Mr. Scott's book) as a correct statement of the Spanish law.

All of the Texas decisions recognize *tide* as the controlling factor in the Spanish law concept of *seashore*. (See GALVESTON v. MENARD, 23 Tex. 349, 399; GALVESTON CITY SURF BATHING CO. v. HEIDENHEIMER, 63 Tex. 559, 562; DEMERIT v. ROBISON, 102 Tex. 358, 361.) There is no Texas decision which supports respondent's contention.

There is no translation of the Partidas which supports respondent's contention. It is plain that the Spaniards disagree with respondent. In 1815 King Ferdinand 7th promulgated an order giving registered seafaring men the free right to sell fish on seashore and piers. This order described the shore as " * * * All that space which the water of the sea bathes in its daily flux and reflux and twenty ordinary varas more above the high tide mark." [1] King Ferdinand's order continued as a part of the law of Mexico after Mexico achieved its independence.[2] There can be no doubt that seashore, as defined in Las Siete Partidas, means land covered by the daily ebb and flow of the *tide* to the Spaniards, the Mexicans, the Texas courts and to the Court of Appeals.

The decision of the Court of Appeals cannot be reconciled with the applicable local decisions.

Respondent does not attempt to distinguish STATE v. BALLI, 144 Tex. 195, and does not deny that the BALLI decision is squarely in conflict with the decision in the present

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[1] Las Leyes Federales Vigentes sobre Tierras, Bosques, Aguas, Ejidos, Colonizacion y el Gran Registro de la Propiedad por el Lic. Niceto Villamar and S. Moreno Cora, page 372, Second Edition, Mexico, 1900.

[2] Code of Colonization and Vacant Lands of the Republic of Mexico; arranged by Francisco F. de la Maza, published agreeable to resolution of the President of the Republic, Mexico, 1893, pages 488-489. Id. pp. 711-713. Id. pp. 1106-1111.

case. These two cases involve the same question of local property law arising out of identical factual situations. Yet the Court of Appeals reached a result opposite to the result reached in the BALLI case. Respondent recovered in the BALLI case on the ground that *tide* marks the boundary between a Mexican grant and Laguna Madre. Application of this principle of local law to the admitted facts of the present case necessarily would defeat respondent's claim.

The Court of Appeals did not hold that the land in controversy is "seashore". Its decision is expressly based upon the holding that petitioners failed to prove that the land in suit accreted to petitioners' grants. That holding is contrary to the fundamental rule that a plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's. Respondent claims that it proved a prima facie title by introducing in evidence its leases from the State, citing STATE v. DELESDENIER, 7 Tex. 76. That case is not authority for respondent's contention because it is applicable only to a suit by the State. No Texas decision holds that a lessee from the State has the benefit of any presumption. On the contrary, a lessee from the State must, like any other plaintiff, recover upon the strength of its own title. Furthermore, such a presumption would not aid respondent, since the land in suit admittedly is above the reach of the *tide*.

Petitioners would be entitled to judgment as to certain of the tracts in controversy even if the evidence showed conclusively that no accretion has occurred. The line of mean high tide and highest tide in winter is shown on Defendants' Exhibit 20, attached to the petition. That line runs along the east side of Tracts 273, 280 and 281. Petitioners' grants call for Laguna Madre as their eastern boundary. The enumerated tracts must be included in Los Mirasoles and Little Barreta in order to give effect to the call for

Laguna Madre. If these tracts are not included in these grants, then the grants are not bounded by Laguna Madre at all. It is a fundamental rule of local law, recognized since the earliest Texas decisions, that a call in a grant for a body of water as a boundary must be given controlling effect in locating the grant. Respondent makes no effort to justify the decision of the Court of Appeals which disregarded the call for this natural object.

Conclusion

WHEREFORE, petitioners pray that this Court issue a writ of certiorari, directed to the United States Court of Appeals for the Fifth Circuit, and that the judgment of the Court of Appeals and the judgment of the District Court be reversed by this Honorable Court.

HUMBLE OIL & REFINING COMPANY,
MRS. SARITA K. EAST,
MRS. ELENA S. KENEDY,
Petitioners

By GORDON BOONE,
ALLEN V. DAVIS,
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Respondent

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF TEXAS, AMICUS CURIAE, IN OPPOSITION

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BRIEF FOR THE STATE OF TEXAS, AMICUS CURIAE, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 190 F. 2d 191. The opinion of the Court of Appeals on petition for rehearing is reported at 191 F. 2d 705. The opinion of the District Court on the intervention of the State of Texas is reported at 88 F. Supp. 658.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT

This suit was instituted by respondent, Sun Oil Company, a New Jersey corporation, against petitioners, Mrs. Sarita K. East and Mrs. Elena S. Kenedy, both citizens of Texas, and Humble Oil & Refining Company, a Texas corporation, lessee of the Kenedy Ranch. The purpose of the suit is to remove cloud from the title to 26 described tracts leased by the State of Texas to respondent in Laguna Madre, a lagoon between the mainland and Padre Island, in Kenedy County, Texas, and to enjoin petitioners from interfering with the development of the area by respondent for oil and gas purposes. The State of Texas was allowed by the trial court to intervene under its claim of ownership of these tracts and the minerals thereunder, subject to the oil and gas leases held by Sun.

Petitioners claimed title to the area by accretion or reliction to their mainland grants (Big Barreta, Los Mirasoles, and Little Barreta), issued by Spain and the Mexican State of Tamaulipas. Respondent and the State of Texas contended that the area is a part of the seashore under the controlling civil law and also that none of the area has become a part of petitioners' mainland grants as a result of accretion or reliction. These allegations and contentions are fully set forth in the opinion of the Court of Appeals (190 F. 2d at 193-194), the pertinent portions of which are quoted on pages 2-3 of the petition for certiorari.

After filing extensive findings of fact and conclusions of law (R. 1829-1868), the trial court rendered judgment for respondent and the State of Texas, adjudging the State to be the owner of the area, subject to the oil and gas leases held by respondent, removing

the clouds from the title of the State and respondent, and enjoining petitioners from interfering in any way with respondent and the State in the development of the area for oil and gas (R. 1895-1910).

The Court of Appeals reversed the action of the trial court in allowing the intervention of the State and denied the petition to intervene; otherwise, the judgment was modified so as not to be binding upon the State, and as so modified the judgment was affirmed.

ARGUMENT

I.

The Court of Appeals correctly held that the controverted area has not become a part of petitioners' mainland grants by accretion or reliction.

The issue in this case is whether the portion of Laguna Madre in controversy has become a part of petitioners' mainland grants as a result of accretion or reliction. As stated by the Court of Appeals:

> "The appellants do not assert a grant from any sovereign to this controverted area; but they claim it by accretion to the shore of the mainland. The crucial question for determination is whether land, which admittedly was a part of the original bed of Laguna Madre and outside of appellants' mainland grants, has become a part of the mainland under the doctrine of accretion." (190 F. 2d at 199.)

Respondent established a prima facie case by introducing in evidence oil and gas leases from the State covering the area in question. *Short v. W. T. Carter & Bro.*, 133 Tex. 202, 219, 126 S.W. 2d 953, 963 (1938); *Schneider v. Lipscomb County Nat. Farm Loan Ass'n,*

146 Tex. 66, 75, 202 S.W. 2d 832, 837 (1947). The burden then devolved upon petitioners to prove that the location of the boundary line of their mainland grants had been changed by accretion or reliction so as to include this area. *Peterson v. City of St. Joseph,* 348 Mo. 954, 156 S.W. 2d 691 (1941); *In re East River Drive, Borough of Manhattan, City of New York,* 289 N.Y.S. 433 (1936); *Meeker v. Kautz,* 213 Iowa 370, 239 N.W. 27 (1931); *Mercurio v. Duncan,* 131 Neb. 767, 269 N.W. 901 (1936); *Hauber v. Gentry,* 215 S.W. 2d 754 (Mo. Sup. 1948); 65 C.J.S. 183, Navigable Waters, Sec. 85.

Petitioners rely primarily upon the fact that this area is above the reach of the daily ebb and flow of the tide. Petitioners' principal witness was Dr. Fisk, an employee of Humble Oil & Refining Company, who said that the area "gradually filled up, layer on layer, until it reached sea level, and then built up to its present sea level position, at which time the flats became connected with the mainland, and that accumulation has been continuing layer on layer, even now, where it is, in places, several feet above sea level." (R. 1289.) No evidence was presented by petitioners of any gradual and imperceptible addition of sediment to their shore line so as to extend the shore into Laguna Madre or that the water began receding from their shore line.

The Court of Appeals summarized the evidence and findings as to the physical features of this area and the action of the water in covering the area as follows:

> "From maps, photographs, aerial mosaics, and the oral testimony of witnesses, the court below found that what commonly has been regarded as Laguna Madre, prior to this controversy, is clearly

defined and easily visible. Around the grass line on the island and the mainland, there is a short sandy beach, which constitutes the shore of Laguna Madre, Spanish for mother lake or lagoon. The area in controversy is above sea level, sloping according to the contour from one one-hundredth of a foot above sea-level to three or four feet. Some of the islands in Laguna Madre at their high points are as much as 25 feet or more above sea level. It is impossible to determine what has accreted to the islands and what to the mainland. Deer and rattlesnakes have been seen on some of the islands in the Lagoon; on some of them are grass, cactus, sunflowers, and heavy brush, including large mesquite trees, especially on Toro Island.

"Waters of the Laguna Madre stand throughout the year from Corpus Christi Bay on the north to a point approximately even with the south end of Lopena Island; and from the Brazos-Santiago Pass near Brownsville, on the south, to and including Redfish Bay, at a point less than a mile from Block 369, one of the tracts in controversy. It is from these bays and passes that sea water rolls over the lands in suit, throughout the year, driven by the prevailing winds, which continue from 9 to 10 months of the year. Within 24 hours after these strong winds start blowing, the waters of the sea roll in rapidly, inundating great portions of the entire area, including the inlets between the various islands and the shore of the mainland. The sea water rolls over the small sandy beaches to the grass lines leaving foam, driftwood, and the like. The water is extremely salty; it covers all of the land in controversy for appreciable portions of the year. At such times this water contains literally millions of seafish; seagulls and pelicans are seen feeding on the fish. The water varies from three to four inches to many feet in depth; seaplanes can and do land upon it, and

> boats navigate it safely. Often the waters of the south and north basins are joined, and the various islands are isolated by water. When the water recedes, salt is deposited, fish die, and all of the area, except that on the beaches, is mud, sand, and leathery algae. During the dry season a large part of the area is dry. There is no grass or plant life of any kind in the entire area, except upon the islands. Some testimony dealt with the effect of storms and rainfall, but the court below thought that this had no substantial effect upon the movement of sea water over the lands in controversy. The finding is that sea water rolls over the entire area throughout the year, irrespective of storms or rainfall; that the movement of this sea water over the entire area is formidable, the pictures resembling general coastal water with considerable waves; and that there is a regular movement of sea water repeated many times throughout the year over all or part of the lands in controversy, but that this movement is caused by the prevailing winds and not by the ebb and flow of the tide." (190 F. 2d at 196-197.)

It is clear that under the above evidence, which is undisputed, the Court of Appeals correctly held that petitioners had not proved that this area has become a part of their mainland grants by accretion or reliction.

The controlling principle is stated in *Hammond v. Shepard,* 186 Ill. 235, 243, 57 N.E. 867, 868 (1900), as follows:

> "All of the authorities agree that, in order that a shore owner take land by way of accretion or reliction, it must appear that the addition was to his shore either by the deposit of earth or by the receding of the water from his land, and that such addition must be by slow and imperceptible processes."

In 56 Am. Jur. 897, Waters, Sec. 483, it is said:

> "In order to effect a change of boundary, formations resulting from accretion or reliction must not only be made to the contiguous land, but must operate to produce an expansion of the shore line outward from the tract to which they adhere."

For similar statements of this principle, see *Perkins v. Adams,* 132 Mo. 131, 33 S.W. 778 (1896); 1 Kinney, *Irrigation and Water Rights* (2d ed. 1912) 928; 1 Farnham, *Waters and Water Rights* (1904) 320; Houck, *Navigable Rivers* (1868) 147-148; 65 C.J.S. 179, Navigable Waters, Sec. 82.

It is thus established that "accretions belong to the land from which they begin and, in order to entitle the riparian owner to the alluvion, the accretion must begin from his land and not from some other point so as to finally reach his land. Hence where his ownership is only to the bank or shore, the accretion must begin at that point." 65 C.J.S. 179, Navigable Waters, Sec. 82; *Hohl v. Iowa Cent. Ry.,* 162 Iowa 66, 143 N.W. 850 (1913); 56 Am. Jur. 899, Waters, Sec. 485.

Any alluvion deposited on the bed of Laguna Madre in the manner described by petitioners' principal witness, Dr. Fisk, is, under the above rule, an accretion to the bed and, as held by the Court of Appeals, belongs to the owner of that bed, the State of Texas. This was recognized in *City of Victoria v. Schott,* 29 S.W. 681, 682 (Tex. Civ. App. 1895), where the court said: "The islet, when formed, was an accretion to the soil in the bed of the stream, and the owner of such bed became the owner of the accretion." See *Maufrais v. State,* 142 Tex. 559, 571, 180 S.W. 2d 144, 150 (1944).

In *St. Louis v. Rutz,* 138 U.S. 226, 247 (1891), this Court said:

> ". . . It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island or dry land which subsequently may be formed thereon."

All of the evidence shows that the boundary of Laguna Madre is still clearly visible and well known, being demarked in this area by the shore of petitioners' mainland grants, which, with well-defined banks, still rises above the bed of Laguna Madre (R. 1838-1840, 1843, 177, 249, 1242; D. Ex. 23-28). This is shown also by the "Advance Print" of the United States Coast & Geodetic Survey map of the area submitted by petitioners, of which they seek to have this Court take judicial notice. The following statement in Coulson and Forbes, *The Law Relating to Waters* (4th ed. 1924) 37, is therefore particularly applicable here:

> ". . . The doctrine of accretion will never apply when the old line of demarcation between the land and water has always been in existence and still remains patent for all to see."

The above "Advance Print" submitted by petitioners, which, incidentally, states that it is "subject to correction after verification and review," in fact supports the evidence presented by respondent and the findings of the trial court as to the action of the water in this area. The following "Note" is found on this print:

> "Water stages in this area vary widely with meteorological conditions. The high-water line has been omitted where it is indefinite and is not marked by visible evidence on the ground. The

> broken line indicates the approximate inshore limits of areas subject to inundation. The dotted line represents the approximate low-water line."

The print shows that the entire area in controversy is subject to inundation by the high water and that the bed is covered by "sand and mud."

"Where water periodically rises over land and then recedes, there is no reliction." *Anderson v. Ray,* 37 S.D. 17, 22, 156 N.W. 591, 593 (1916); 56 Am. Jur. 892, Water, Sec. 476. There must be a "permanent uncovering of the land or laying bare of the bottom by permanent retirement of the waters." 65 C.J.S. 173, Navigable Waters, Sec. 81; *State v. Longyear Holding Co.,* 224 Minn. 451, 29 N.W. 2d 657 (1947); *Hillebrand v. Knapp,* 65 S.D. 414, 274 N.W. 821 (1937); *Sapp v. Frazier,* 51 La. Ann. 1718, 26 So. 378 (1899); *State v. Thompson,* 134 Iowa 25, 111 N.W. 328 (1907). There being no dispute that the prevailing winds cause the sea water to roll over the area in question many times throughout the year, the Court of Appeals correctly held that there has been no reliction.

The Court of Appeals concurred in the findings of the trial court that there has been no accretion or reliction to petitioners' mainland grants. (190 F. 2d at 199.) In the opinion denying the petition for rehearing, the Court said:

> "After an extended hearing of much oral and documentary evidence, the trial court found that the sea has not abandoned these lands; that whatever building up has taken place has been by depositions to the bed of the sea, by accretions to the islands (mainly if not entirely to Toro) by relictions from Padre Island, and not by accretions to

> the shore of the mainland, which is still plainly discernible. The lower court specifically found that: 'The line of demarcation between the Laguna and the Mainland is still patent for all to see. The area in controversy . . . is not fast land.' It also found that there has not been any substantial change or building up of the area since the original surveys, particularly since the survey by Lieutenant Meade in 1846. In the last analysis, our decision must rest upon these findings, as in our judgment they are not clearly erroneous. . . ." (191 F. 2d at 716.)

It is well settled that these concurrent findings of fact by the two courts below "will be accepted here without re-examination of the evidence." *Allen v. Trust Company of Georgia*, 326 U.S. 630 (1946); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Comstock v. Group of Investors*, 335 U.S. 211, 213-214 (1948).

II.

The opinion of the Court of Appeals does not conflict with the Balli case.

Petitioners assert that the opinion of the Court of Appeals conflicts with the decision in *State v. Balli*, 144 Tex. 195, 190 S.W. 2d 71 (1944), cert. den. 328 U.S. 852, saying that the Texas Supreme Court in that case "held that the Mexican grant conveying Padre Island to respondent's predecessors extended to the line of mean high tide because Laguna Madre was called for as the west boundary of the island." (Petition, p. 4.) That the alleged conflict does not exist is shown clearly by an examination of the facts and holding in the *Balli* case.

State v. Balli was a suit in trespass to try title brought by the State of Texas. The grant involved in that case was a Mexican grant of an island, confirmed by the Legislature as an island. The State in its petition described the island by field notes prepared by J. S. Boyles, which, as shown in the opinion of the Texas Court of Civil Appeals, were "based upon what Boyles considered the line of mean high tide." (173 S.W. 2d 522, 543.) No findings of fact were made by the trial court, which rendered judgment against the State. On appeal, the State for the first time sought to attack Boyles' location of the boundary of the grant along the line of mean high tide. The following extract from the opinion of the Supreme Court shows the basis of the Court's holding on that point:

> "There remains the question of the location of the boundary of the grant. The survey was based upon what the surveyor considered the line of mean high tide. The judgment of the lower courts was to the effect that the State had no interest in and to the lands enclosed by the survey. No survey was made of a line purporting to be the line of high winter tide. It is the contention of the State that the grant is limited by this line under the law in force in Tamaulipas at the time of the grant and that the State should have judgment for the land lying between the line of winter high tide and mean tide. The respondents contended in the Court of Civil Appeals, and make the same contention here, that the evidence is sufficient to support a finding that there is no substantial difference in fact between the line of high winter tide and the line actually surveyed by the surveyor Boyles. The Honorable Court of Civil Appeals reviewed the evidence and sustained the conten-

> tions of respondents. We are in accord with that view." (144 Tex. at 252, 190 S.W. 2d at 101.)

It is apparent from the above extract that the Texas Supreme Court in the *Balli* case did not, either expressly or otherwise, deny the proposition stated earlier in its opinion that the controlling law was "the civil law in effect at the time of the grant as it existed in the State of Tamaulipas," which the Court said was "the law as incorporated in Las Siete Partidas." (144 Tex. at 248, 190 S.W. 2d at 99.) The Court stated that under that law

> ". . . The seashore was defined to be 'all that ground is designated the shore of the sea which is covered with water of the latter during the whole year, whether in winter or summer.' " (144 Tex. at 251, 190 S.W. 2d at 100.)

The Court thus adopted White's translation of the Partidas, which is in accord with the official Gregorio Lopez edition (1555) and all other English translations except one.[1]

The Court of Appeals also recognized the controlling effect of the Spanish law in this case, saying:

> "Under the Spanish law, the seashore extends to the line of the highest tide in winter. Mayor, etc., of City of Galveston v. Menard, 23 Tex. 349, 399. In inland seas, at some places, the tides are nearly insensible. Precisely speaking, where there is no tide there is no shore; but, because a portion of the sea has no shore, it does not follow that it

[1] White's *New Recopilacion of the Laws of Spain and the Indies* (1839) 70 contains the following translation: "By shore of the sea we understand whatever part is covered with water, whether in winter or summer."

has no bed. The area in controversy was formerly the bed of the sea. The burden on the appellants was two-fold: first, to prove that the sea had abandoned this area; second, to prove that appellants had acquired it by accretion or reliction. According to the findings below, the appellants did not meet either burden." (191 F. 2d at 716.)

It is clear that there is no conflict between the decision of the Texas Supreme Court in the *Balli* case, which recognized that Padre Island "is bounded by . . . Laguna Madre on the west,[2] and the holding of the Court of Appeals in this case that petitioners' mainland grants are bounded by Laguna Madre on the east and do not include the area in question. This area has always been and is now a portion of the bed of Laguna Madre which is held in trust by the State of Texas for the benefit of all its people.

III.

The Court of Appeals correctly held that this is an equitable proceeding in which the parties were not entitled to a jury trial as a matter of right.

A jury was appointed in this case in an advisory capacity (R. 1882-1884), and evidence was presented for nearly three weeks before the court and jury. However, after counsel for petitioners and all other counsel agreed that there were no issues of fact to go to the jury, the jury was discharged (R. 1368-1395).

As shown in the opinion of the Court of Appeals on rehearing, petitioners did not there complain "of the discharge of the jury in itself, but of the court having made findings of fact after having decided the case on

[2]144 Tex. at 200, 190 S.W. 2d at 73.

the undisputed facts." (191 F. 2d at 714.) Petitioners urged the Court of Appeals "to decide the case on the merits if possible," stating that "the trial was lengthy, arduous, and expensive; that the case was fully developed by both sides; and that they should consider it most regrettable if the entire case should be sent back for another trial." (191 F. 2d at 714.) Petitioners do not ask this Court to send the case back for a retrial before a jury but contend that the findings of fact by the trial court should be disregarded.

In denying the petition for rehearing, the Court of Appeals discussed at length the nature of this suit and petitioners' right to a jury trial, concluding that this was an action to remove cloud or to quiet title "inherent in equity, and that the parties were not entitled to a jury trial as a matter of right." (191 F. 2d at 708.)

In seeking to show this is not an action in equity, petitioners assert that respondent was not in possession of the area and that petitioners were in possession of the area by reason of their possession of the mainland.

The allegations as to possession of the controverted area were discussed by the Court of Appeals as follows:

> "The plaintiff alleged in its complaint that, at the time of suit, it was in the actual possession of all of said land. The defendants denied that plaintiff was in possession of 'each of said tracts,' but admitted that plaintiff had a camp located on said land and had done some surveying thereon. Later, the answer denied that the plaintiff was actually in possession of any of said land except the small area surrounding said camp. The defendants did not allege that they were in possession of any of

> the controverted area, but only that it was accreted land, above mean high tide, on which they had mineral leases. Neither side alleged that the defendants were in possession of the land. . . ." (191 F. 2d at 708-709.)

The record shows that respondent "had such possession as the character of its leasehold interest entitled it to exercise."[3] (191 F. 2d at 712.) Even if there were some question about this, however, there can be no question about the fact that petitioners were not in fact in possession of this area. Therefore, respondent could not have brought an action in ejectment at common law. *Holland v. Challen,* 110 U.S. 15, 25 (1884). Since the right to jury trial exists "only if the relief sought were appropriate to ejectment,"[4] petitioners would not have been entitled to a jury even if the statutory trespass to try title action had been brought.

The Texas trespass to try title statute provides that

> "All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title."[5]

Insofar as this statute authorizes a suit at law by one in possession, it is a remedy "subsequently provided by statute and which did not previously exist" at common law, and thus is a case in which no constitutional right to jury trial exists in the federal courts.

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[3]R. 208-211, 214-272, 273-312; P. Exs. 12-50, 92-570, 591-611.

[4]3 Cyc. Fed. Proc. 490, Sec. 791.

[5]Laws of the Republic of Texas, 3rd Cong., 1st Sess. (1840), p. 136; 2 Gammel, Laws of Texas 310; codified as Article 7364, Vernon's Texas Civil Statutes.

Simmons v. United States, 29 F. Supp. 285, 286 (W. D. Ky. 1929). The right of trial by jury preserved under the Seventh Amendment "is the right which existed under the English common law when the Amendment was adopted." *Baltimore & C. Line v. Redman,* 295 U.S. 654, 657 (1935).

That the equity jurisdiction of the federal courts is not ousted by state legislation providing a remedy by an action at law has long been established. *McConihay v. Wright,* 121 U.S. 201 (1887); *Sheffield Furnace Co. v. Witherow,* 149 U.S. 574 (1893). As stated in *Smyth v. Ames,* 169 U.S. 466, 516 (1898):

> ". . . One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. *Case of Broderick's Will,* 21 Wall. 503, 520; *Holland v. Challen,* 110 U.S. 15, 24; *Dick v. Foraker,* 155 U.S. 404, 415; *Bardon v. Land & River Imp. Co.,* 157 U.S. 327, 330; *Rich v. Braxton,* 158 U.S. 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute —may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne v. Hook,* 7 Wall. 425, 430; *McConihay v. Wright,* 121 U.S. 201, 205."

Respondent prayed for a removal of the clouds cast

upon its title by petitioners and for an injunction restraining petitioners from interfering with respondent's enjoyment of its rights to the property (R. 76-77). Suits to remove cloud or to quiet title have always been the subject of equity jurisdiction, and "may be resorted to under proper circumstances even where the legal title is involved, and although it may not have been previously established at law." *Wilmore Coal Co. v. Brown,* 147 Fed. 931, 946 (W. D. Pa. 1906), aff. 153 Fed. 143, cert. den. 209 U.S. 546; 51 C.J. 148, Quieting Title, Sec. 22.

The latest pronouncement by this Court of the rule that there is no right to jury trial in "an equity action for an injunction" is found in *United States v. Louisiana,* 339 U.S. 699, 706 (1950). For a collection of the cases on this question, see the annotation in 117 A.L.R. 9, 12 (1938), where it is said that

> ". . . the mere fact that in deciding as to whether equitable relief shall be granted a court must dispose of issues of legal title or right is not generally regarded as rendering the suit one at law wherein a jury trial may be had as of right, the character of the appropriate relief and the inadequacy, or nonexistence, of legal remedy being sufficient as a foundation of equity jurisdiction."

Therefore, petitioners' contention that they were wrongfully deprived of a trial by jury is wholly without merit.

CONCLUSION

For the foregoing reasons it is respectfully sub-

mitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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